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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ADAM VALDOBINOS,

Defendant and Appellant.

F055913

(Super. Ct. No. 1097480)

**OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Nancy E. Ashley, Judge.

Linda M. Leavitt, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Senior Assistant Attorney General, David A. Rhodes and Ivan P. Marrs, Deputy Attorneys General, for Plaintiff and Respondent.

## **INTRODUCTION**

Appellant Adam Valdobinos appeals from a judgment of 15 years to life plus one year. He contends that the prosecutor committed misconduct during closing argument. He also contends that the abstract of judgment does not conform to the oral pronouncement of sentence. We will affirm the judgment and remand for the superior court to determine the correct presentence custody credit.

## **STATEMENT OF THE CASE**

On February 22, 2007, the Stanislaus County District Attorney's Office filed an information charging appellant with murder (Pen. Code, § 187 – count 1).<sup>1</sup> It also was alleged that appellant used a deadly and dangerous weapon, a knife, in commission of count 1 (§ 12022, subd. (b)) and had suffered a prior serious felony conviction within the meaning of sections 1192.7, subdivision (c) and 667, subdivision (d).

On the same date, appellant pled not guilty and denied the special allegations.

Jury trial began on June 23, 2008. Appellant's motion to bifurcate the prior conviction was granted, and he waived his right to a jury trial on the prior.

On July 7, 2008, the jury found appellant guilty of count 1, and found the knife allegation to be true. On July 8, 2008, the prior conviction allegation was dismissed.

On August 8, 2008, the trial court sentenced appellant to 15 years to life for count 1 plus a one-year determinate term for the knife enhancement. The trial court also imposed two \$200 restitution fines, one of which was stayed, and a \$5,910 victim restitution fine. Finally, appellant was credited with 1,068 days of presentence custody.

On the same day, appellant timely filed his notice of appeal.

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<sup>1</sup> All subsequent section citations are to the Penal Code unless otherwise indicated.

## **STATEMENT OF THE FACTS**

Nicole Marie Walker was the prosecution's main witness at trial. Walker testified that, on October 12, 2003, she went to a house occupied by Kenni Nunez to meet her friend, Nathaniel Helton. She wanted Helton to give her drugs and loan her money for a motel room that night. Walker was accompanied by her friends, Mondre Caldwell and Maurice Purnell.

Helton was not at the Nunez house, so Walker called Helton on the phone. Helton told her to meet him at the Cameron Villa apartment complex. At some point on the way to meeting Helton, Walker found out that Helton was unhappy that she had taken Black people to the Nunez house. Helton told her not to "bring niggers to my house."

Walker and her friends pulled into the driveway of the apartment complex, and her friends dropped her off on the southeast corner. Walker then called Helton to meet her. Helton, Joe Godinez and someone she knew as "the Grinch" (later identified as appellant) came up to her and she began talking to Helton. She was approximately five feet away from "the Grinch." Meanwhile, her friends drove past where she was standing and turned a corner so Helton and the others could not see them.

Jesse Watson, a Black man, had come to the apartment complex to look for his nephew who was supposed to be at his niece's apartment in the Cameron Villa complex. Watson drove up to Walker, Helton, Godinez and appellant, got out of his car and approached them. Walker testified that someone from her group said, "Who is that?" Watson replied, "Oh, I'm sorry, I thought you were my niece's group" or "[m]y niece's crew." Someone from the group said, "Do we look black?" Watson replied, "Oh, you could look black and blue" or "some stupid joke or something." Walker testified that "the Grinch" fatally stabbed Watson right after Watson uttered his joke. Watson put his hands up, stepped backward and tripped over the cement parking curb.

Someone then yelled, “Come on.” According to Walker, she responded by screaming, “That’s F’d up.” She went to help Watson and at that point realized the seriousness of his injury. She initially thought that he was punched. The rest of the group then ran away through the apartment complex.

Walker went back to her car and Watson followed her. She got into the car with her companions. As they started to drive away, the driver said, “Well, we can’t just leave him here.” So they called 911 a few times, told the 911 operator that there was a man bleeding in a parking lot and then drove off.

That night Walker spoke with one of her friends about the incident. She had described “the Grinch’s” appearance to her friend. Walker recalled that “the Grinch” was wearing a black and white, either plaid or checkered, button-up collared shirt made of a silk-like material or cotton, and either dark blue or black jeans. Her friend told Walker that “the Grinch’s” name was Adam Valdobinos and described him.

The next day, Walker heard that Watson had died and received messages on her phone from the police indicating that they needed to talk to her. She met with Officers Al Brocchini and Ray Coyle at an IHOP restaurant, after which they went to a police station. Initially, Walker did not tell the police that she was with her boyfriend, Mondre Caldwell, because he was on bail and she did not want to get him involved. The officers showed her a picture of appellant, which she identified as “the Grinch.”

During Walker’s second conversation with the police, she told officers that the person who stabbed Watson was “the Grinch.” They showed her a photo array and she identified appellant as the stabber. Walker also identified appellant in a live lineup, one and a half years later.

Walker also testified that, at the time of the trial, she was awaiting sentencing on several felony counts and would be spending a year in jail on three of those offenses. She further testified that, after the homicide in this case occurred in 2003, she was accepted

into the California State Witness Protection Program. The state paid Walker's housing costs from October 2003 until June 2006, but she was terminated from the program following her arrest.

On cross-examination, Walker testified that she deliberately misled the police officers during the first interview. She did not tell them that she was going to the apartment complex to buy drugs. She withheld the names of her companions. She told the detectives that she did not know if she could recognize the man who stabbed Watson because he ran away, it was dark, and she was talking to Helton so her attention was diverted. Walker also told the officers that three persons were with Helton, when actually there were only two people. She volunteered that, since the guy who did the stabbing was short, it might have been Robert Cuevas, a friend of Helton.

Walker testified that she was uncooperative initially because she did not want to get involved. However, as she learned about the victim, she "started feeling really bad" so she began to cooperate. Later, Walker learned that she was distantly related through marriage to Watson's common-law wife. Walker also testified that she used methamphetamine at the time, but not on the night Watson was stabbed.

Mondre Caldwell also testified at trial. He was with Walker and Purnell at the apartment complex and saw a Black man who was hurt. The man was on top of the car that they were driving. Caldwell saw blood on his hand after he removed the man from the car. He could not remember anything else because he was drunk at the time.

Dr. Jennifer Rulon, a forensic pathologist who performed the autopsy on Watson, testified that death resulted from multiple stab wounds and bleeding.

Nathaniel Helton testified and denied that appellant was present when he met Walker. Instead, he told the police that he ran into two men looking for a girl and that one of them had stabbed a Black man. Neither of the two males was appellant.

## **Defense**

The defense presented testimony from Officer Al Brocchini and Dr. Scott Fraser.

Officer Brocchini testified that, at the first interview, Walker told him that she did not know the individuals who were with Helton the night of the stabbing. However, several days later she called the police after talking with her friends and said appellant was the stabber. During the photo lineup, Walker also identified another individual as being similar to the person who did the stabbing. The individual was a person of interest in the case.

Dr. Fraser was previously qualified as an expert witness in the areas of memory, eyewitness identification and human night vision. He testified that there was essentially a full moon on the night of the incident. He also arranged to recreate the lighting conditions on the night of the incident. Dr. Fraser testified that the lighting conditions at the time of the stabbing may have caused the people Walker saw to be backlit or “photo [occluded],” making them appear as black bodies. Additionally, Dr. Fraser testified that lack of focus on an individual and distractions by others in a group can affect a later identification.

Dr. Fraser also is an expert in psychopharmacology, and he testified that he has studied the effects of methamphetamine on the human brain. He testified that persons on methamphetamine have greatly impaired perception, and they have very unreliable recall and recognition.

Given a hypothetical about Walker’s position, actions, and the environmental conditions, Dr. Fraser testified that Walker would not see anything that could be used to recognize individuals. In his expert opinion, Walker’s identification of appellant as the man that stabbed Watson was not reliable without independent corroboration.

## DISCUSSION

### I

#### Prosecutorial Misconduct

On appeal, appellant contends that the prosecutor committed prosecutorial misconduct when he told the jury during closing argument that he was convinced of Walker's credibility. We conclude that appellant does not have a viable claim for prosecutorial misconduct.

"The standards governing review of misconduct claims are settled." (*People v. Friend* (2009) 47 Cal.4th 1, 29.) "In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review." (*Ibid.* [internal quotations omitted].) "When a claim of misconduct is based on the prosecutor's comments before the jury, 'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citations.]" (*Ibid.* [internal quotations omitted].) "It is improper for the prosecution to vouch for the credibility of a government witness. Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony." (*United States v. Roberts* (9th Cir. 1980) 618 F.2d 530, 533.) However, "[a]lthough a prosecutor may not personally vouch for the credibility of a witness, a prosecutor may properly argue a witness is telling the truth based on the circumstances of the case. [Citation.]" (*People v. Boyette* (2002) 29 Cal.4th 381, 433.) Thus, it is permissible for a prosecutor to argue that a witness was credible because the witness was an eyewitness to the crime and aspects of his testimony suggested he was telling the truth. (*Ibid.*)

Here, in closing argument, the prosecutor referred to Walker as being the key to the case. He then said that this case was about a murder. “It is about the credibility of this woman and you judging her credibility. And I’m convinced -- although, my convincing doesn’t matter. It matters what [*sic*] you are convinced, when you look at all the evidence before you, by and large, the segments of her interviews.”

The defense made no objections. This is the only occurrence where the prosecutor vouched for the credibility of a prosecution witness, and he immediately told the jury that what mattered was its determination of the credibility of the witness. Also, there is no indication that an objection would have been futile or that an admonition would not have cured any harm. Thus, appellant has forfeited his claim of prosecutorial misconduct. Moreover, the prosecutor’s comment about Walker’s credibility is permissible argument because it was made in the context of Walker being an eyewitness and as part of the argument that aspects of Walker’s interviews suggested that she was telling the truth. (See *People v. Boyette*, *supra*, 29 Cal.4th at p. 433.)

## **II**

### **Abstract of Judgment**

Appellant also contends that the abstract of judgment should be corrected to conform to the oral pronouncement of judgment. The People concede the error.

Appellant, however, also raises the argument that he was not awarded presentence actual custody credits of 1,758 days. Instead, the trial court awarded 1,068 days of presentence actual custody credit. The People, without any citation to statutory or case law, contend that appellant is not entitled to additional presentence custody credit because appellant was sentenced on two cases during the August 8, 2008, sentencing hearing, and he was awarded 758 days’ credit in the other case. Thus, according to the People, appellant was awarded the full amount (or more) of presentence custody credit.



We conclude that the appellate record is insufficient for us to determine the correct amount of presentence custody credit.

The appellate record does not include a probation report. Although this court ordered that the appellate record be supplemented with the probation report on November 17, 2008, the Stanislaus County Superior Court informed us that “no Probation Report [was] found.”<sup>2</sup>

Appellant concludes that he served 1,758 days in actual custody because the trial transcripts show that he was arrested on October 17, 2003, and that he was sentenced on August 8, 2008, a period of 1,758 calendar days. However, this calculation is based upon the assumption that appellant was in custody during the entire period. Although this is likely correct, there is no evidence in the appellate record to support this assumption.

Instead, the appellate record shows that, during the August 8, 2008, sentencing hearing, appellant was sentenced in case No. 1063528 (for involuntary manslaughter) to a determinate term of 15 years with 651 days’ actual credit and 97 days’ good behavior and work credit. In this case, appellant was sentenced to a mandatory 15 years to life and given credit for 1,068 days’ credit with no good behavior or work credit. The two sentences were consecutive. Thus, the record indicates that the trial court believed that appellant served only 1,719 days in actual custody. There is insufficient evidence to determine which figure (1,758 days or 1,719 days) is correct.

Additionally, there is insufficient evidence to determine whether the trial court properly apportioned the presentence actual custody credit. From the sentencing, it appears that appellant was charged with the other offense after he had served 1,068 days

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<sup>2</sup> It is possible that no probation report was filed, or that one probation report was created for both cases and filed with case No. 1063528, and no copy of the probation report was filed in this case.

in presentence custody for this case. Thus, appellant was awarded presentence custody credit in that case for the remainder of the time that he was in actual custody. However, we cannot determine whether this was the actual factual situation. Furthermore, it is unclear whether appellant is entitled to the 97 days' credit for good behavior and work in the other case. (See *People v. McNamee* (2002) 96 Cal.App.4th 66, 68 [a defendant convicted of murder is not entitled to conduct credit for any part of his murder sentence]; *In re Reeves* (2005) 35 Cal.4th 765, 772-773 [under the Determinate Sentencing Act multiple consecutive terms merge into a single sentence].)

### **DISPOSITION**

The judgment is affirmed. The matter is remanded to the superior court to determine the presentence custody credit consistent with the views expressed herein.

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Levy, J.

WE CONCUR:

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Ardaiz, P.J.

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Kane, J.